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LIAH BUNSU v. OTHMAN SARKAWI & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
CELESTINA STUEL GALID JC
[CIVIL APPEAL NO: KCH-12B-18-11-2017]
8 FEBRUARY 2018

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TORT: *Negligence – Damages – Claim for special and general damages by widow and administratrix of estate – Claim for and on behalf of all dependants of deceased – Claim arising from road accident – Collision between car and lorry – Contradicting versions between parties – Version to be accepted by court – Whether deceased contributorily negligent in causing collision – Civil Law Act 1956, ss. 7 & 8*

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TORT: *Road accident – Negligence – Collision between car and lorry – Contradicting versions between parties – Version to be accepted by court – Whether lorry driver was speeding – Whether evidence supported by other contemporaneous evidence – Whether damages on car consistent with version that lorry was speeding – Whether brake marks showed that lorry driver was speeding and failed to stop to avoid collision – Apportionment of liability – Whether deceased contributorily negligent in causing collision – Civil Law Act 1956, ss. 7 & 8*

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The first defendant, the authorised driver of the second defendant, drove the lorry owned by the second defendant which collided with the motorcar driven by one Chong Hee Jong ('the deceased'). The appellant ('the plaintiff'), the widow and administratrix of the estate of the deceased, commenced an action at the Sessions Court against the respondents ('the defendants') for negligence in causing the death of the deceased. The action was brought under ss. 7 and 8 of the Civil Law Act 1956 ('the CLA') for the benefit of the estate and for and on behalf of all the dependants of the deceased. In claiming for special and general damages against the defendants, the plaintiff submitted that (i) the first defendant drove the lorry behind the car driven by the deceased and due to speeding, failed to stop and the lorry collided with the rear end of the car, causing the car to spin and land into the drain; (ii) it was the first defendant's negligence that the collision occurred, resulting in the death of the deceased; and (iii) the medical certificate stated that the cause of death was 'severe traumatic brain injury due to road traffic accident'. The defendants denied liability and argued that (i) the deceased failed to keep a proper look-out before emerging from the right of the junction into the first defendant's right of path; (ii) the deceased failed to heed the continuous double white lines prohibiting overtaking or crossing on the stretch of road; and (iii) the collision was solely caused, or alternatively, contributed, by the deceased's negligence. Accepting the defendants' version of the accident, the Sessions Court Judge ('the SCJ') dismissed the plaintiff's claim. Hence, the present appeal.

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Held (allowing appeal in part):

(1) Apart from the first defendant, no other witness, who had testified, was an eyewitness to the collision. The investigating officer ('PW6') testified for the plaintiff on the actual collision based on his investigation. The defendants' version was accepted as (i) the first defendant's evidence was supported by contemporaneous evidence, namely, his police report which was made about three hours after the collision; (ii) the photograph of the deceased's car showed the larger extent of damage on the car's left side rear bumper and this was consistent with the first defendant's version; and (iii) in cross-examination, PW6 agreed that the deceased exited the junction and the plaintiff did not re-examine PW6 on his evidence. (paras 15, 18 & 20)

(2) The extent of the damage on the car of the deceased was not supported by the evidence of the first defendant that he was not speeding. The first defendant stated that he only saw the deceased's car one meter before collision. If the first defendant had indeed not been speeding, the impact at one meter would not have caused the extent of damage on the rear side of the car. Furthermore, the brake marks were 38 meters long and this was contrary to the first defendant's evidence that he only saw the deceased's car one meter before the collision. It was safe to infer from the brake marks that the first defendant was indeed speeding and failed to stop to avoid the collision. (paras 23, 24 & 26)

(3) The deceased had contributed to the collision by exiting from the junction and getting into the first defendant's right of path. Liability was apportioned at 80% for the defendants and 20% for the deceased. The second defendant was vicariously liable for the actions of the first defendant. (paras 28 & 30)

(4) No evidence was led as to the living expenses incurred by the deceased at the time of his death. The total quantum of damages awarded to the plaintiff was RM93,358 for (i) funeral expenses and all incidental and consequential expenses (RM25,700); (ii) costs of reports and searches conducted (RM58); (iii) loss of support at RM300 per month for 16 years (RM57,600); and (iv) bereavement (RM10,000). (paras 34-35)

Case(s) referred to:

Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor [1995] 4 CLJ 317 HC ***(refd)***

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Chong Keow v. Shaari Yaakob [1988] 1 CLJ 325; [1988] 1 CLJ (Rep) 463 HC ***(refd)***

Foong Nan v. Sagadevan [1971] 1 LNS 33 FC ***(refd)***

Murtadza Mohamed Hassan v. Chong Swee Pian [1979] 1 LNS 57 FC ***(refd)***

Nam Ho Travel Service (s) Pte Ltd v. Progressive Insurance Sdn Bhd [1994] 1 CLJ 280 HC ***(refd)***

A *Shahrizam Damsah v. Mahathir Mohd Isa & Anor [2013] 1 LNS 1108 HC* ***(refd)***
Thangachimmah & Anor v. Flower [1968] 1 LNS 159 HC ***(refd)***
Wong Kum Keong v. Yeap Chooi [1986] 1 LNS 55 SC ***(refd)***
Yew You & Anor v. Mah Poay Koh & Anor [1969] 1 LNS 209 FC ***(refd)***

Legislation referred to:
B Civil Law Act 1956, ss. 7(3)(iv)(c), 8, 11
Courts of Judicature Act 1964, s. 29
Rules of Court 2012, O. 55 r. 2, O. 59 r. 24

For the appellant - June Chan; M/s Liew Advocs
For the respondents - Kueh Tze Yang; M/s Mutafa Kueh & Tai Advocs

C *[Editor's note: Appeal from Sessions Court; Suit No: KSN-A53KJ-6/3-2017 (SC) (overruled in part).]*

Reported by Najib Tamby

D **JUDGMENT**

Celestina Stuel Galid JC:

Introduction

[1] This is an appeal against the decision of the Kota Samarahan Sessions
E Court in dismissing the plaintiff's claim against the defendants for negligence in causing the death of the deceased arising from a motor vehicle collision driven by the first defendant.

The Parties

[2] The plaintiff is the widow of the deceased and is suing in her capacity
F as the administratrix of the estate of the deceased.

[3] The first defendant is the driver of the lorry, which collided with the motorcar driven by the deceased and was the servant, agent and/or authorised driver of the second defendant.

G **[4]** The second defendant is the owner of the lorry.

Statement of Agreed Facts (exh. "B")

[5] The following facts have been agreed by the parties:

(a) The plaintiff is the lawful widow and administratrix of the estate of
H Chong Hee Jong, the deceased and she brings this action for the benefit of the estate and for and on behalf of all the dependents of the deceased, under ss. 8 and 7 of the Civil Law Act 1956 as amended respectively. Letters of administration have been granted to the plaintiff on 25 July 2016.

I (b) At all material times, the first defendant was the driver and the second defendant was the owner of a motor vehicle no. QSY 4709 ("the lorry").

(c) On 22 October 2014, at about 7.20am along KM98 Jalan Kuching/Sri Aman, there was a collision involving a motorcar no. QKA 102 ("the car") driven by the deceased, and the lorry driven by the first defendant, as the servant, agent and/or authorised driver of the second defendant.

(d) The cost of JPJ extract is agreed at RM10.

(e) The cost of police documents is agreed at RM8.

(f) The cost of the deceased's medical report from Serian Hospital is agreed at RM40.

(g) The dependents of the deceased are:

(i) Liah Anak Bunsu, widow of the deceased, aged 21 at the time of the accident;

(ii) Chong Choi Fatt, son of the deceased, aged 3 at the time of the accident; and

(iii) Abella Chong, daughter of the deceased, 5 months old at the time of the accident.

(h) At the material time, the deceased was 28 years old.

The Plaintiff's Claim

[6] The plaintiff claimed that it was due to the first defendant's negligence that the collision occurred resulting in the death of the deceased. It was the plaintiff's case that the first defendant was driving the lorry behind the car driven by the deceased and due to speeding, failed to stop and the lorry collided with the rear end of the car causing the car to spin and land in the drain. The medical certificate stated the cause of death as being "severe traumatic brain injury due to road traffic accident". By this suit, the plaintiff claimed for special damages in the sum of RM98,100 and general damages, interest and costs against the defendants.

The Defendants' Defence

[7] The defendants denied liability and asserted that the collision was caused solely or alternatively contributed by the negligence of the deceased. The defendants' version of events was that the deceased had failed to keep any or any proper look-out before emerging from the junction at the right hand side of the road into the first defendant's right of path and failing to heed the continuous double white lines prohibiting overtaking or crossing on the stretch of road where the collision occurred.

The Sessions Court's Decision

[8] There are no full grounds of decision of the Sessions Court in the record of appeal but it was recorded in the notes of proceedings when delivering his ruling, that the learned Sessions Court Judge had found as follows:

A The evidence shows on 22.10.2014 at about 7.20am along KM98 of Sri Aman – Serian road, the first defendant was driving on its own path of travel from Sri Aman to Serian direction and that the deceased came out of the junction from the other side of the road entering into the first defendant land and at this moment the first defendant who was not in time to avoid, collided into the rear of the deceased car, causing it to spin B and landed in the drain at the roadside. This is shown by the first defendant lorry brake mark on the road measured 38m (124.7 feet) long which shows a sudden braking due to the sudden appearing of the deceased car into its lane of travel at the material time.

There is not much can be gathered from the investigating officer PW6 as C the investigator only described how the scene look like and that the investigator agreed with the deceased was exiting the junction of "reban ayam" and entering into the first defendant path where the rear collision against the deceased car occurred. The investigator sketch plan exh. P18 shows the collision is at the first defendant path of travel.

D The deceased should be more careful when coming out of the junction to the outer land particularly if the road is with a double continues (*sic*) white line and only exiting if the traffic is clear.

On the balance of probabilities, the plaintiff has failed to prove negligence on part of the first defendant in causing the collision and the evidence show the deceased is to be blamed in the accident.

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[9] The learned Sessions Court Judge accepted the version of the defendants that the deceased had wrongfully gone into the first defendant's right of path and that the first defendant could not therefore avoid the collision.

F **This Court's Analysis And Findings**

[10] Order 55 r. 2 of the Rules of Court 2012 ("ROC"), *inter alia*, provides that "all appeals to the High Court shall be by way of re-hearing". Also relevant is s. 29 of the Courts of Judicature Act 1964 which provides that:

G All civil appeals from a subordinate court shall be by way of re-hearing and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

[11] While an appellate court should be slow in interfering with a lower H court's findings of fact, it is trite law that an appellate court may do so in certain circumstances. Suffice for this court to quote what the Federal Court had stated in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; [2006] 5 MLJ 1 as follows:

(1) A distinction has to be made between a finding on a specific fact which I relies on the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion, than in the case of the former. An appellate

court cannot peremptorily say it is not prepared to interfere with the assessment of facts of a trial judge against the oral and written evidence presented before him, without even making any distinction as to the nature of the findings. It is only after an analysis of the evidence afresh, and on a review of the law, can such a finding be made by an appellate court. In the instant case, the approach of the appellate court in merely endorsing the finding of the trial judge without a critical assessment of the evidence was against these authorities: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517, *Eng Thye Plantations Bhd v. Lim Heng Hock & Ors* [2001] 4 MLJ 26 and *Sivalingam a/l Periasamy v. Periasammy & Anor* [1995] 3 MLJ 395.

On Liability

[12] Firstly, there is no issue herein as to whether the first defendant owed a duty of care to the deceased, thus, learned counsel for the plaintiff and the defendants correctly centered their arguments on whether such duty had been breached.

[13] To determine that issue, the following questions of fact are relevant to be considered:

(a) Did the deceased come out of the junction (marked as a circle in exh. P18(1)) and go into the path of the first defendant or was the deceased already on the road and in front of the lorry driven by the first defendant when the collision occurred? and

(b) Was the first defendant speeding?

[14] As earlier indicated, the plaintiff and the defendants' versions conflicted as to how the collision occurred. In evaluating the evidence, I take guidance in what Lim Beng Choo J (as he then was) said in the case of *Chong Keow v. Shaari Yaakob* [1988] 1 CLJ 325; [1988] 1 CLJ (Rep) 463:

The existence of two conflicting versions of how an accident occurred (as it happens here) is typical in almost all motor vehicle accident cases. In such a situation, I will have to carry out a searching evaluation and assessment of the totality of the oral evidence and also to resort to the documentary evidence in order to find out the truth. In my attempt to uncover the truth in order to arrive at a just decision, I must not lose sight of the principle that in assessing the evidence of the parties in a suit, it is not merely a question of whom to believe but rather whose version is inherently probable which is the prime consideration.

Did The Deceased Come Out Of The Junction (Marked As A Circle In Exh. P18(1)) And Go Into The Path Of The First Defendant Or Was The Deceased Already On The Road And In Front Of The Lorry Driven By The First Defendant When The Collision Occurred?

[15] Apart from the first defendant, no other witness who had testified in this trial was an eyewitness to the collision.

[16] In his examination-in-chief, the first defendant, who was the sole witness for the defendants testified that as he was driving uphill, suddenly the car driven by the deceased came out and/or encroached and/or entered into the main road from the junction located at his right hand side and headed towards Kuching, the same direction as he was going. He immediately applied the lorry brakes to avoid the collision but due to the close proximity of distance between the car and the lorry, the lorry crashed into the rear and/or back part of the car.

[17] While assessing the evidence of the first defendant, I am reminded of what the Federal Court case of *Yew You & Anor v. Mah Poay Koh & Anor* [1969] 1 LNS 209 had said that:

> ... the mere fact that the evidence of the alleged eyewitness proved worthless is far from conclusive against the plaintiffs. In the nature of things the plaintiffs were compelled to rely mainly on the mute testimony of the sketch plan and photographs, together with the observations of the investigating officer as the foundation of their case. They could also avail themselves of admissions by the defence. A fact, not to be lost sight of, is that only the self-serving evidence of the lorry driver and his mate tells us where the injured man was lying on the road before they removed him. There were no eyewitnesses. The possibility therefore, cannot be ruled out that, if the lorry driver was at fault, his foremost concern would be to do what he could to exculpate himself. The evidence presented by the defendants ought therefore, to be scrutinised carefully, if not with some suspicion, since they had no fear of contradiction by a dead man.

[18] As for the plaintiff, although six witnesses were called, only the investigating officer (PW6) had testified on the actual collision based on his investigation.

[19] Based on the evidence of the first defendant and PW6, I accept the defendants' version that the deceased had come out of the junction and gone into the path of the lorry driven by the first defendant.

[20] The following are my reasons:

(a) The first defendant's evidence during trial is supported by contemporaneous evidence ie, his police report (exh. D1) which was made about three hours after the collision;

(b) The photograph of the car of the deceased – exh. P19(4) shows the larger extent of damage on the car's left side rear bumper. This is consistent with the defendants' version that the car had come out from the junction on the lorry's right side;

(c) In cross-examination, PW6 agreed that the deceased had exited the junction marked with a circle on exh. P18(2) to the main road before the collision (see lines 3-6, p. 43, lines 22-25, p. 43, lines 20-22, p. 44, lines 16-20, p. 46, and lines 2-4, p. 47 of the ROA). Learned counsel for the plaintiff did not re-examine PW6 on his said evidence;

(d) In re-examination (lines 11-17, p. 47 of the ROA) PW6 had testified that: A

> Q: You earlier testified in cross-examination that the Deceased did not take proper look out due to the poor visibility before he exited the junction. Do you agree know this as a fact or was it based on your interview with the driver of the lorry? B
>
> A: Sebab rumah si mangsa di situ dan ada kawan dia di situ memberitahu bahawa si mangsa hendak ke Serian.

Was The first Defendant Speeding?

[21] There are numerous decided cases that have held that in the absence of direct evidence, speeding may be inferred from the tyre brake marks on the road – see *Thangachimmah & Anor v. Flower* [1968] 1 LNS 159, *Wong Kum Keong v. Yeap Chooi* [1986] 1 LNS 55 and *Nam Ho Travel Service (s) Pte Ltd v. Progressive Insurance Sdn Bhd* [1994] 1 CLJ 280. C

[22] Firstly, it was not challenged by learned counsel for the defendants that the brake marks in this case was of 38m (124.7 feet) long. D

[23] Secondly, the extent of the damage on the car of the deceased as shown in exh. P19(4) is not supported by the evidence of the first defendant that he was not speeding. The first defendant said that he only saw the car of the deceased one meter before the collision – see lines 2-5, p. 54 of the ROA. To my mind and if the first defendant had indeed not been speeding, the impact at one meter would not have caused the extent of damage on the rear side of the car. I also do not agree with the suggestion by learned counsel for the defendants that the damage sustained could have been due to the impact of landing inside the ditch and hitting the barrier of the side of the road. Such suggestion is not supported by the specific location of the damage at the rear bumper of the car. E F

[24] Thirdly, the first defendant's evidence that he only saw the car of the deceased one meter before the collision is contrary to the 38m brake marks and the sketch of PW6 ie, exh. P18(1) which shows the impact point "X" at the end of the brake marks. That means the D1 must have at least seen the car of the deceased 38m before the impact. If the first defendant had not been speeding as he had contended, it does not make any sense that he was not able to stop the lorry and avoid the car driven by the deceased. G H

[25] As for the contention by learned counsel for the defendants that the brake marks could also indicate that when the first defendant applied the emergency brake, the lorry could not come to a complete stop due to the wet and slippery road surface, I note that this particular proposition was not suggested to PW6 in cross-examination at all. Thus, I tend to view that this is an afterthought on the part of the defendants. Furthermore, the first defendant did not in his police report (exh. D1) state that that was the reason I

why he could not stop in time. What he said was "saya cuba mengelak tetapi jarak terlalu dekat …" meaning, he was too close to stop, not that he was unable to stop (due to the wet and allegedly slippery road).

[26] Based on the above evidence and guided by the decided cases on this issue, I find that it is safe to infer from the brake marks that the first defendant was indeed speeding and thereby failed to stop to avoid the collision.

Was There Contributory Negligence On The Part Of The Deceased?

[27] It is pleaded in para. 5 of the defence that the collision was contributed by the negligence of the deceased.

[28] Having regards to my findings on the two issues above, I find that the deceased had contributed to the collision by exiting from the junction and getting into the first defendant's right of path. In the premises, I apportion liability at 80% for the defendants and 20% for the deceased.

Liability Of The Second Defendant

[29] The parties did not address the court on this issue in submissions. It is, however, an agreed fact in the statement of agreed facts that the first defendant had driven the lorry as "a servant, agent and/ or authorised driver of the second defendant".

[30] I therefore find and hold the second defendant to be vicariously liable for the actions of the first defendant.

On Damages

[31] The plaintiff's summary of her claim is as follows:

(i) Funeral expenses and all incidental and consequential expenses – RM25,700

(ii) Costs of reports and searches conducted – RM58

(iii) Loss of support at RM300 per month for 16 years – RM57,600; and

(iv) Bereavement – RM10,000

[32] Only item (iii) is being disputed by the defendants, stating instead that the sum payable for loss of support is only RM51,264. The defendants contended that following the case of *Shahrizam Damsah v. Mahathir Mohd Isa & Anor* [2013] 1 LNS 1108; [2014] 10 MLJ 490, the value of the dependency claims is to be determined at 2/3 of the deceased's salary and approximately 1/3 of the deceased's earning is to be deducted to account for living expenses.

[33] On this issue, I agree with the submission of learned counsel for the plaintiff that the deduction for living expenses can only be made if the amount is either admitted by the plaintiff or proved by the defendants – see *Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor* [1995] 4 CLJ 317; [1995] 4 MLJ 182 and s. 7(3)(iv)(c) of the Civil Law Act 1956.

[34] In the present case, no evidence was led as to the living expenses incurred by the deceased at the time of his death. Neither was the plaintiff cross-examined on this issue. This is to be distinguished from the case of *Shahrizam Damsah v. Mahathir Mohd Isa & Anor* cited by the defendants wherein there were evidence of monthly deductions as stated in the salary slips of the deceased.

[35] I therefore award the quantum of damages to the plaintiff totalling RM93,358 as follows:

(a) Funeral expenses and all incidental and consequential expenses – RM25,700

(b) Cost of reports and searches conducted – RM58

(c) Loss of support at RM300 month for 16 years – RM57,600

(d) Bereavement – RM10,000

Costs

[36] I award costs in the sum of RM25,000 here and below and allow the plaintiff's out of pocket expenses of RM1,780.

Interest

On Special Damages

[37] The court has power to award interest on debts and damages. This is expressly provided under s. 11 of the Civil Law Act 1956.

[38] Citing the Federal Court in *Murtadza Mohamed Hassan v. Chong Swee Pian* [1979] 1 LNS 57; [1980] 1 MLJ 216, the plaintiff submitted that the interest on the special damages of 5% p.a. should be calculated from the date of the accident on 22 October 2014 to the date of the judgment (the date cited of 10 November 2017 was the date of the judgment of the Sessions Court).

[39] The defendants on the other hand, cited the Federal Court case in *Foong Nan v. Sagadevan* [1971] 1 LNS 33, to contend that if the court was minded to exercise its discretion to award interest on special damages, it ought to be one-half of the prescribed interest rate of 5% per annum or 2.5% per annum.

[40] Having regards to the parties' submissions on this issue, I award interest of 2.5% per annum on special damages to be calculated from the date of the accident on 22 October 2014 to the date of the judgment before this court on 8 February 2018 and 5% p.a. from the date of judgment on 8 February 2018 to the date of full and final settlement.

On General Damages

[41] It was held by the Federal Court in *Murtadza Mohamed Hassan v. Chong Swee Pian*, *supra*, that the interest on general damages is to run from the date of service of the writ. In this case, there is no date given by the parties as to the date of service of the writ. However, the plaintiff prayed for the date of filing or service of the defendants' memorandum of appearance of 6 April 2017 to be taken as the date of service of the writ. On the other hand, the defendants contended and relying on the case of *Foong Nan v. Sagadevan*, *supra*, it should be from the date of the writ.

[42] Given that the parties have not address the court as to what is the actual date of service of the writ and given that the defendants would not be in a worse off position if the date is set later (ie, after the date of the service of the writ) and from the date of the memorandum of appearance, I award interest at 5% per annum on general damages to be calculated from 6 April 2017 to the date of the judgment on 8 February 2018 until the date of full and final settlement.

On costs

[43] Order 59 r. 24 of the ROC allows for the imposition of interest on the costs awarded by the court. Interest is therefore fixed at 5% per annum on the costs allowed from the date of judgment on 8 February 2018 until the date of full and final settlement.

Conclusion

[44] The plaintiff's appeal is therefore allowed in part as per the terms set out above.